Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1092

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONTINENTAL MANORS, INC., PETITIONER
v.
MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court lacked subject matter jurisdiction of a suit brought to enjoin the termination of a nursing home's participation in the Medicare program.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A10) and the district court (Pet. App. A11-A38) are not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1982 (Pet. App. A8!). A petition for rehearing was denied on October 5, 1982 (Pet. App. A83). The petition for a writ of certiorari was filed on December 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The court of appeals' opinion in *Americana Healthcare Corp.* v. *Schweiker* (Pet. App. A47-A80), which was consolidated for decision with the present case, is reported at 688 F.2d 1072, cert. denied, No. 82-839 (Feb. 22, 1983).

STATEMENT

1. Part A of the Medicare program, as set forth in Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. IV) 1395c *et seq.*, provides coverage for hospital, skilled nursing facility, and home health services for aged and disabled individuals. The program is federally funded and is administered by the Secretary of Health and Human Services. A nursing home may participate in the Medicare program, and thus be reimbursed for the cost of serving eligible beneficiaries, by entering into a provider agreement with the Secretary after the Secretary certifies that the facility meets the requirements for a skilled nursing facility. 42 U.S.C. (& Supp. IV) 1395cc; 42 C.F.R. Part 405, Subpart S. In order to be certified and to maintain its certification, the nursing home must meet, based on on-site surveys, each of several "conditions of participation" relating to the health and safety of its patients. 42 U.S.C. (& Supp. IV) 1395x(j); 42 C.F.R. Part 405, Subpart K and 489.10. If a certified facility no longer meets the conditions of participation, the Secretary may terminate or decline to renew the facility's provider agreement upon reasonable notice to the facility. 42 U.S.C. (& Supp. IV) 1395cc(b)(2)(A); 42 C.F.R. 489.16 and 489.53.[2] A dissatisfied facility is entitled to the same administrative and judicial review procedures that are provided under 42 U.S.C. (Supp. IV) 405(b) and (g) to social security recipients affected by adverse administrative action. 42 U.S.C. 1395ff(c). See *Mathews* v. *Eldridge*, 424 U.S. 319, 327-332 (1976).

2. Petitioner Continental Manors, Inc. operates a nursing home that was certified as a Medicare skilled nursing facility. A certification survey conducted by federal health

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[2]Payments may be made to the facility for services furnished to eligible beneficiaries within 30 days after the effective date of termination. 42 U.S.C. 1395cc(b)(3); 42 C.F.R. 489.55.

care professionals disclosed, however, that petitioner was not in compliance with numerous federal standards for skilled nursing facilities. Federal officials accordingly notified petitioner that because it did not meet Medicare conditions of participation its Medicare provider agreement would not be renewed (Pet. App. A3). Petitioner was also furnished with a detailed list of deficiencies supporting this determination (*ibid.*). Federal officials concluded that petitioner's deficiencies seriously limited its capability to render adequate care and thus placed its patients' health and safety in immediate jeopardy (*ibid.*). Petitioner was informed of its right to request administrative reconsideration and was given an opportunity to submit additional evidence within 60 days of the initial determination (*ibid.*).[3]

Petitioner requested reconsideration, contending that appropriate corrective action would be taken (Pet. App. A3, A19). Thereafter, petitioner submitted additional documentation proposing correction of certain deficiencies and contesting the existence of others. Representatives of petitioner also met with federal officials prior to the effective date of nonrenewal to discuss the facility's deficiencies (*id.* at A4, A20). Federal health care professionals resurveyed the facility prior to the effective date of nonrenewal and

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[3]The decision that a provider agreement will not be renewed upon its expiration is an "initial determination" (42 C.F.R. 405.1502) from which a certified facility is entitled to take an administrative appeal. 42 C.F.R. 405.1501-405.1518. If the initial nonrenewal decision is upheld on reconsideration, the facility may obtain a hearing before an administrative law judge. See 42 C.F.R. 405.1510-405.1560. The decision of the administrative law judge may in turn be reviewed by the Appeals Council, 42 C.F.R. 405.1561, the last step in the administrative review process. The decision of the Appeals Council represents the "final decision" of the Secretary subject to judicial review. 42 U.S.C. 1395ff(c); 42 C.F.R. 405.1567.

found that serious deficiencies continued to exist (*id.* at A3, A41-A46).[4]

Rather than pursuing further administrative review of its claim, petitioner filed this action in the United States District Court for the Northern District of Illinois. The suit was filed before the nonrenewal date of petitioner's provider agreement and sought to enjoin the Secretary from terminating the agreement on the ground that the Secretary's actions deprived the facility of an opportunity to be heard prior to termination, in violation of the substantive and procedural requirements of the Social Security Act (Pet. App. A4). Petitioner also challenged the Secretary's findings of noncompliance and immediate jeopardy (*ibid.*).[5] Following a bench trial, the district court granted a preliminary injunction and ordered continuation of petitioner's provider agreement (*id.* at A39).

3. The court of appeals reversed in an unpublished order (Pet. App. A1-A10), relying on its decision issued the same date in *Americana Healthcare Corp.* v. *Schweiker*, 688 F.2d 1072 (1982), cert. denied, No. 82-839 (Feb. 22, 1983).[6]

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[4]A portion of the resurvey was completed on the day following the effective date of nonrenewal (Pet. App. A4, A41-A46).

[5]Eight days after the nonrenewal date of petitioner's provider agreement, federal officials issued a reconsideration decision affirming the initial decertification action (Pet. App. A4-A5, A41-A42). Petitioner was furnished with a detailed statement of deficiencies that listed, among other items, the following: failure to assure timely physical examinations of patients, failure to record patient progress, failure to formulate adequate patient care plans, failure to assure that physician orders are signed, and serious violations of the Life Safety Code (*id.* at A43-A46). These deficiencies also existed at the time of the earlier federal survey (*ibid.*).

[6]In *Americana*, the court of appeals reversed separate district court orders granting injunctive relief to four nursing homes that had been terminated from the Medicare and Medicaid programs. Relying upon this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and

The court of appeals determined that petitioner "has failed to establish a colorable constitutional claim of a denial of due process" and held that, absent such a claim, the district court lacked jurisdiction because a "final decision" following exhaustion of administrative remedies had not been made, as required by 42 U.S.C. (Supp. IV) 405(g) (Pet. App. A6). The court noted that petitioner received advance notice of the initial decertification decision and thereafter "was afforded more than an adequate opportunity to contest the [Secretary's] determination * * *" (*ibid.*). The court of appeals rejected the district court's conclusion that petitioner in fact met federal Medicare standards because this type of factual review was precluded by Section 405(g)

Mathews v. *Eldridge*, 424 U.S. 319 (1976), as well as its own decision in *Northlake Community Hospital* v. *United States*, 654 F.2d 1234 (7th Cir. 1981), the court of appeals held that the district court lacked jurisdiction under 28 U.S.C. (Supp. V) 1331, 42 U.S.C. (Supp. IV) 405(g) or 28 U.S.C. 1361 to grant the relief sought. Jurisdiction under 28 U.S.C. (Supp. V) 1331 was found to be precluded by 42 U.S.C. 405(h) (Pet. App. A66-A67). The court of appeals similarly determined that jurisdiction was not conferred under 42 U.S.C. (Supp. IV) 405(g) because the nursing homes had not exhausted their administrative remedies. The court found (Pet. App. A69-A70) that exhaustion was not waived because the plaintiffs had failed to present a colorable and collateral constitutional claim (citing *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 331-332). After weighing the many procedural protections afforded the facilities at the administrative level and the strong government interest in expeditious provider termination procedures against the risk of erroneous decertification, the court found that the facilities "have failed to establish a colorable claim of constitutional entitlement to a pre-termination hearing" (Pet. App. A69-A70). Finally, the court of appeals rejected the facilities' claim that the district courts had mandamus jurisdiction pursuant to 28 U.S.C. 1361 and Section 916(a) of the Omnibus Reconciliation Act of 1980 ("OBRA"), Pub. L. No. 96-499, 94 Stat. 2623, 42 U.S.C. (Supp. IV) 1395cc(f) (Pet. App. B1, B3-B4). After a careful analysis of Section 916(a) of OBRA and its legislative history, the court concluded that it provided no "clear right to a pre-termination hearing" and mandamus jurisdiction was therefore inappropriate (Pet. App. A79-A80).

"until such time as the Department has had an opportunity to review its own determination and reach a 'final decision' " (*id.* at A7). Similarly, the court of appeals held that the district court had inappropriately disregarded the Secretary's initial finding of "immediate jeopardy" when it concluded that petitioner was entitled to a pre-termination hearing pursuant to 42 U.S.C. (Supp. IV) 1395cc(f) (Pet. App. A9).[7] Finally, the court of appeals criticized the district court's reliance on petitioner's "promises of the future correction of deficiencies," stating that such promises "must not be allowed to indefinitely extend the participation of a substandard facility in the Medicare program" (*id.* at A9-A10). In these circumstances, the court of appeals concluded that the district court had erroneously enjoined the facility's termination from the Medicare program.

ARGUMENT

The decision of the court of appeals is consistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). It is also in accord with the federal courts of appeals' unanimous conclusion that the Medicare provider decertification procedures are consistent with due process.[8] Moreover, this Court, in *Americana Healthcare Corp.* v. *Schweiker*, *supra*, recently declined to review issues identical to those

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[7] 42 U.S.C. (Supp. IV) 1395cc(f) (Pet. App. B3-B4), as added by Section 916(a) of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2623, provides certain alternative procedures to the decertification of skilled nursing facilities found to be in noncompliance with federal Medicare standards.

[8] *Northlake Community Hospital* v. *United States*, 654 F.2d 1234 (7th Cir. 1981); *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262 (10th Cir.), cert. denied, 454 U.S. 832 (1981); *Green* v. *Cashman*, 605 F.2d 945 (6th Cir. 1979); *Caton Ridge Nursing Home, Inc.* v. *Califano*, 596 F.2d 608 (4th Cir. 1979); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266 (3d Cir. 1978); *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975).

raised by petitioner.[9] Accordingly, further review is unwarranted.

1. Petitioner initially contends (Pet. 7-9) that subject matter jurisdiction is available under 42 U.S.C. (Supp. IV) 405(g)[10] because its due process claim may be heard prior to full exhaustion of administrative remedies. The court of appeals, however, relying on the companion case of *Americana Healthcare Corp.* v. *Schweiker, supra* (Pet. App. A47-A80), properly rejected this argument. The court of appeals held (*id.* at A6) that, in view of the many procedural protections available to petitioner, it had not presented a "colorable" constitutional claim of a denial of due process and must therefore exhaust its administrative remedies prior to resorting to suit in federal district court.[11]

Petitioner concedes that due process does not require a pre-termination evidentiary hearing (Pet. 8). Petitioner, moreover, admits that it had numerous opportunities prior to the effective date of nonrenewal to respond to the Department's initial determination (*id.* at 3-4). Nevertheless, petitioner argues (*id.* at 7-8) that it was unconstitutionally denied an "effective" and "meaningful" opportunity to be heard prior to termination because (1) the Department did not issue its reconsideration decision (see note 5, *supra*) until after the effective date of termination, (2) federal

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[9]We are providing counsel for petitioner with a copy of our brief in opposition in *Americana*.

[10]42 U.S.C. 1395ff(c) provides that a facility whose agreement is terminated has the right to a hearing and to judicial review of the final decision made after the hearing as provided in 42 U.S.C. (Supp. IV) 405(g).

[11]Like the petitioners in *Americana Healthcare Corp.* v. *Schweiker, supra*, petitioner in this case was given "an initial warning period" and was thereafter allowed "numerous opportunities to submit new evidence of compliance and plans for correction" (Pet. App. A6).

officials relied on resurvey results rather than on the facility's submissions in upholding the initial decision; and (3) the official in whose name the reconsideration decision was issued did not personally examine the facility's submissions.

Contrary to petitioner's assertion, the timing of the Department's reconsideration decision does not establish that petitioner was denied a meaningful or effective opportunity to be heard prior to termination. Petitioner had five weeks' advance notice of the effective date of nonrenewal (Pet. App. A3), but made no oral or written submissions until nine days before the termination date (*id.* at A4). Accordingly, the Department, as a practical matter, could not have made a reconsideration decision before the termination date and still have taken into account petitioner's submissions. Petitioner, therefore, cannot complain of a lack of an opportunity to be heard when it chose not to exercise that opportunity in a timely fashion. Furthermore, petitioner ignores the full range of procedural protections it was afforded prior to termination. After the initial decision was made in the present case, petitioner had five weeks prior to the effective date of nonrenewal to submit more evidence (*id.* at A3). Petitioner had yet another opportunity to demonstrate corrections or refute the existence of deficiencies during the course of the on-site resurveys, before the surveyors submitted their reports to the deciding officials (*id.* at A4-A5). In any event, petitioner was entitled to payments for services furnished up to 30 days after the date of termination so long as the services were provided to program beneficiaries already in the facility. 42 U.S.C. 1395cc(b)(3); 42 C.F.R. 489.55. Thus, the reconsideration decision was issued almost one month prior to the actual cut-off of payments to the facility. Had petitioner received a favorable decision on reconsideration, payments for all beneficiaries would have continued uninterrupted.

Petitioner claims repeatedly (Pet. 4, 5, 7, 8) that federal officials ignored the evidence it presented on reconsideration. This asserted denial of due process follows solely from the fact that the Department rendered an adverse reconsideration decision. That decision, however, was based on the results of the Department's resurvey of petitioner's operating conditions (Pet. App. A8, A4, A43-A46). Petitioner asserts that had federal officials accorded proper weight to its submissions, the facility's Medicare participation would not have been terminated. This assertion falls far short of a colorable claim that the government denied petitioner due process. Indeed, that is the type of assertion that should be addressed to a federal court following exhaustion of the administrative review process. 42 U.S.C. (Supp. IV) 405(g).

Finally, petitioner was not denied due process simply because the official making the reconsideration decision did not personally examine the facility's submissions (Pet. 8). Due process does not require that a deciding official personally read all of the evidence, so long as he adequately considers and appraises the evidence by other means (including oral and written reports by subordinates, consultation with staff specialists, etc.). *United States* v. *Morgan*, 313 U.S. 409 (1941) (*"Morgan IV"*); *Morgan* v. *United States*, 304 U.S. 1 (1938) (*"Morgan II"*); *Morgan* v. *United States*, 298 U.S. 468 (1936) (*"Morgan I"*); *Yaretsky* v. *Blum*, 629 F.2d 817, 822-823 (2d Cir. 1980), cert. denied, 450 U.S. 925 (1981); *Bates* v. *Sponberg*, 547 F.2d 325, 331-332 (6th Cir. 1976). Petitioner's due process argument confuses the deciding official's understanding of the evidence with the mechanics by which that understanding is developed. Petitioner does not contend, and the district court's opinion does not suggest, that the subordinates and staff specialists on whom the deciding official relied failed to review petitioner's submissions. Since petitioner's

materials were reviewed, considered and sifted prior to the reconsideration decision, there was no denial of due process.

Because petitioner was afforded more than an adequate opportunity to contest the nonrenewal of its Medicare provider agreement, it has failed to raise a colorable constitutional claim of a denial of due process. Consequently, the court of appeals correctly concluded that subject matter jurisdiction was unavailable under 42 U.S.C. (Supp. IV) 405(g).[12]

2. Petitioner next contends (Pet. 10-11) that 42 U.S.C. (Supp. IV) 405(g) and (h) do not bar jurisdiction over the facility's claim that the Department acted in excess of its delegated authority and contrary to explicit statutory requirements, citing this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).[13] Petitioner's reliance on

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[12]Petitioner contends (Pet. 9) that respondents never challenged the district court's findings of fact and those findings must therefore be upheld under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). The only relevant "facts" found by the district court, however, are those pertinent to the threshold question of jurisdiction. Here, the court of appeals concluded that "[t]he record * * * demonstrates that [petitioner] * * * was afforded more than an adequate opportunity to contest the Department of Health and Human Services' determination" (Pet. App. A6) and the district court was accordingly without jurisdiction. Nothing in the district court's opinion is in conflict with the court of appeals' conclusion. To the extent that the district court made further "findings" relating to the facility's compliance with federal Medicare standards, those findings were beyond the court's jurisdiction.

[13]In *Leedom*, a group of professional employees challenged the failure of the National Labor Relations Board to obtain their consent in certifying a collective bargaining unit composed of both professional and nonprofessional employees, contrary to the "clear and mandatory" requirement of the governing statute (358 U.S. at 188). The NLRB admitted its violation of the statute, but contended that the district court lacked original jurisdiction over a direct challenge to a certification order. The governing statute provided for review of a certification order by the court of appeals only in the event that an unfair labor

Leedom, however is misplaced on several grounds.[14] First, as petitioner concedes (Pet. 11), *Leedom* did not involve statutory provisions similar to Section 405(g) and (h). The statute at issue in *Leedom* contained no express language precluding direct district court review prior to exhaustion of administrative remedies. See *Briscoe* v. *Bell*, 432 U.S. 404, 413 n.13 (1977). Section 405(g) and (h), by contrast, expressly forecloses judicial review until after exhaustion of such remedies and bars federal question jurisdiction over petitioner's claims. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 756-762. Second, unlike the plaintiffs in *Leedom*, petitioner has adequate administrative and judicial remedies to protect its statutory rights.

In any event, petitioner fails to allege a plain disregard of a "clear and mandatory" statutory directive (358 U.S. at 188). *Leedom* does not require immediate district court review simply because a legal question is involved or because a party challenges an agency's interpretation and application of a statute or regulation. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Physicians National House Staff Association* v. *Fanning*, 642 F.2d 492, 495-496 (D.C. Cir. 1980). Petitioner claims (Pet. 11) that the Department violated 42 C.F.R. 405.1515 (Pet. App. B5) by making its reconsideration decision without considering the facility's submissions. As shown above, however, neither the fact

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practice charge followed an employer's refusal to bargain with a certified union. This Court found that, since the complaining professional employees had no other means within their control to secure review of the NLRB's error, the absence of district court jurisdiction would result in the " 'obliteration of a right which Congress had created' " (358 U.S. at 190). Under these circumstances, this Court disagreed with the NLRB's jurisdictional arguments.

[14]This Court has characterized *Leedom* as a case involving "extraordinary circumstances" with "narrow" and "painstakingly delineated procedural boundaries." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479, 481 (1964).

that the Department found those submissions to be inadequate nor the fact that the deciding federal official did not personally read those submissions can be said to represent a plain disregard of the regulation. Petitioner also claims (Pet. 11) that the Department violated 42 U.S.C. (Supp. IV) 1395cc(f) (Pet. App. B3-B4) by failing to provide a hearing and an opportunity to correct deficiencies prior to termination.[15] That statute, however, does not require a pre-termination correction opportunity and hearing when the Secretary determines that a facility's deficiencies "immediately jeopardize" patient health and safety (*Americana Healthcare Corp.* v. *Schweiker, supra,* 688 F.2d at 1084-1087 (Pet. App. A72-A80)), and the reconsideration decision in this case (*id.* at A41-A46) expressly affirmed the Department's initial "immediate jeopardy" finding (*id.* at A3), listing "numerous serious deficiencies" (*id.* at A3-A4)

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[15] 42 U.S.C. (Supp. IV) 1395cc(f) provides, in pertinent part:

> (1) Where the Secretary determines that a skilled nursing facility * * * no longer substantially meets the provisions of section 1395x(j) of this title, and further determines that the facility's deficiencies —
>
> > (A) immediately jeopardize the health and safety of its patients, the Secretary shall provide for the termination of the agreement or of the certification of the facility and shall provide, or
> >
> > (B) do not immediately jeopardize the health and safety of its patients, the Secretary may, in lieu of terminating the agreement or certification of the facility, provide
>
> that no payment shall be made under this subchapter * * * with respect to any individual admitted to such facility after a date specified by him.
>
> (2) The Secretary shall not make such a decision with respect to a facility until such facility has had a reasonable opportunity, following the initial determination that it no longer substantially meets the provisions of section 1395x(j) of this title, to correct its deficiencies, and, following this period, has been given reasonable notice and opportunity for a hearing.

that immediately jeopardized patient health and safety. Thus, petitioner has failed to demonstrate a plain disregard of a "clear and mandatory" statutory directive, as required by *Leedom* (358 U.S. at 188).

3. Petitioner next contends (Pet. 12-14) that under this Court's decision in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), the district court had jurisdiction to review its statutory claim that the Department's pre-termination procedures contravene 42 U.S.C. (Supp. IV) 1395cc(f)(2). But jurisdiction under 42 U.S.C. (Supp. IV) 405(g) was found in *Yamasaki* because the Secretary waived full exhaustion of administrative remedies and acknowledged that the plaintiffs had obtained a "final decision" as required by the statute. *Califano* v. *Yamasaki*, *supra*, 442 U.S. at 703 n.15; Brief for Petitioner at 54-56, *Califano* v. *Elliott* (No. 77-1511, 1978 Term). See also *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 766-768. That is not the case here.[16]

In any event, this Court need not decide petitioner's statutory claim. Petitioner concedes (Pet. 11, 13, 15) that the provisions of 42 U.S.C. (Supp. IV) 1395cc(f)(2) do not apply when a facility's noncompliance immediately

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[16]Petitioner alleges (Pet. 12-13) that the Secretary's termination decision is "final" and further administrative review would be "futile." There is, however, at least the possibility that petitioner's interpretation of the governing statutes and regulations in this case would prevail during the administrative review process, thus rendering judicial intervention unnecessary. Petitioner, moreover, may be able to show that its facility in fact satisfies the Medicare conditions of participation, also rendering judicial intervention unnecessary. Furthermore, unlike the social security beneficiaries in *Eldridge*, whose interest in continued receipt of benefits was critical enough to warrant judicial resolution of their due process claims prior to full exhaustion, the interests of Medicare providers are far less profound. *Northlake Community Hospital* v. *United States*, *supra*, 654 F.2d at 1242. Accordingly, this is not a case where "a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330.

jeopardizes patient health and safety. *Americana Healthcare Corp.* v. *Schweiker, supra,* 688 F.2d at 1084-1087 (Pet. App. A74-A79). The Secretary found "immediate jeopardy" in this case (*id.* at A3, A9-A10, A17).

4. Petitioner's final contention (Pet. 14-15) is that the district court possesses mandamus jurisdiction pursuant to 28 U.S.C. 1361 to compel the Secretary to provide a hearing and an opportunity to correct deficiencies prior to termination. An identical claim was rejected by the court of appeals in *Americana Healthcare Corp.* v. *Schweiker, supra,* 688 F.2d at 1084-1087 (Pet. App. A74-A79). This Court declined to review the issue in that case, and petitioner has presented no reason to justify a different result in this companion case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03